SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1196

RICHARD KLINE and MARGO KLINE, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

COLDWELL, BANKER & CO. REALTORS; WM. E. DOUD & CO.; RAMSEY-SHILLING CO.; WM. C. KULOW CO.; LELAH T. PIERSON; DIPPELL REALTY; ELSIE STERN; CARRASCO REALTY; BEVERLY HILLS PROPERTY; CHASE REALTORS CO.; TOWNSEND SIMPSON REALTY, INC.; ANNE & DEAN HOOVER, INC.; HERITAGE PROPERTIES; WM. JUSTICE; RUTH CATON REALTY; LATOW REALTY; FLORENCE SIMPSON; LOS FELIZ PROPERTIES, INC.; CASTAGNA REALTY; HOLLYWOOD PROPERTIES; JOHN LANGDON CO.; GEORGE ELKINS CO.; JACK HUPP; FORREST E. OLSON, INC.; GRUBB & ELLIS CO.; FAZIO ASSOCIATES REALTY; MAJESTIC REALTY CO.; LINDGREN REALTY; ROY C. SEELEY CO.; MILTON J. WERSHOW CO.; HELEN F. MEIGS, REALTOR; CARL LATHROP and EARL F. ANDERSON, on behalf of themselves and all others similarly situated; THE LOS ANGELES REALTY BOARD; THE LOS ANGELES REALTY BOARD, SOUTHWEST BRANCH; THE LOS ANGELES REALTY BOARD, HOLLYWOOD-WILSHIRE DIVISION; THE LOS ANGELES REALTY BOARD, PACIFIC PALISADES DIVISION; and THE LOS ANGELES REALTY BOARD, WESTWOOD DIVISION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Richard Kline and Margo Kline pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled action on December 20, 1974, after an interlocutory appeal pursuant to 28 U.S.C. Section 1292(b), reversing the order of the District Court for the Central District of California made pursuant to Rule 23 of the Federal Rules of Civil Procedure certifying that the above action alleging a price-fixing conspiracy might be maintained as a class action.

Opinions Below.

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 20, 1974, and the judgment and opinion of the Court and the concurring opinion of Circuit Judge Duniway are printed in Appendix A hereto. The opinions are officially reported at 508 F.2d 226 (9th Cir. 1974).

The order of the District Court for the Central District of California (District Judge William P. Gray), entered on May 30, 1973, ordering that the instant action might be maintained as a class action is printed in Appendix B hereto.

Jurisdiction.

The jurisdiction of this Court to review the judgment of the Court of Appeals, reversing the district court's order certifying the instant action as a class action, is invoked pursuant to 28 U.S.C. Section 1254(1) and in accordance with Rule 19 of the Rules of the Supreme Court of the United States.

Questions Presented.

1. Is a class certification under Rule 23(b)(3), F.R.Civ.P., precluded in an action alleging a price-fixing conspiracy in violation of Section 1 of the Sherman Act (15 U.S.C. Section 1), and seeking treble damages pursuant to Section 4 of the Clayton Act (15 U.S.C. Section 15)?

2. Is it permissible in an interlocutory appellate review of a Rule 23 class certification for an Appellate Court to (i) substitute its discretion for that of the trial court; (ii) require plaintiff to establish ultimate facts and theories of liability; and (iii) evaluate manageability of the action solely on the basis of the size of the class?

3. Is not proof that individual broker-members of a real estate trade association received a minimum commission schedule from the association and knowingly adhered to that schedule in fixing commissions in the vast majority of their transactions sufficient to establish a *prima facie* case of a conspiracy in violation of the Sherman Act among the association and the adhering broker-members?

Statutes and Rule Involved.

Section 1 of the Sherman Act, 15 U.S.C. Section 1, provides in relevant part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 4 of the Clayton Act, 15 U.S.C. Section 15, provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Rule 23 of the Federal Rules of Civil Procedure provides in relevant part as follows:

> "(a) Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . .
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

> The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.
>
> (c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.
>
> (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdvision may be conditional, and may be altered or amended before the decision on the merits. . . .
>
> (4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

Statement of the Case.

Petitioners moved the district court for an order permitting their action alleging a price-fixing conspiracy to be maintained as a class action. The motion was granted in part, certifying petitioners, Richard and

Margo Kline, as representatives of a plaintiffs' class consisting of sellers of residential real property within Los Angeles County who paid real estate brokerage commissions to the broker-members of the Los Angeles Realty Board in the years 1966 through 1970. The district court also certified the Los Angeles Realty Board and thirty-two named defendant broker-members of the Board as representatives of a defendants' class consisting of the members of the Los Angeles Realty Board who received brokerage commissions for sales of residential real property within Los Angeles County during the applicable period.

The district court certified its order for an interlocutory appeal to the Ninth Circuit pursuant to 28 U.S.C. Section 1292(b), the Ninth Circuit accepted the appeal, and, on December 20, 1974, entered its judgment reversing the decision of the district court that the action could be maintained as a class action.

The relevant facts are as follows: In their amended complaint, petitioners alleged that the Los Angeles Realty Board and its member real estate brokers had engaged in a price-fixing conspiracy in violation of Section 1 of the Sherman Act in that the Board had distributed to its members a schedule of minimum commissions to be charged in residential real estate transactions and the member brokers, knowingly and wilfully, had conspired with the Board to fix and stabilize residential real estate commissions by agreeing to adhere to the minimum commission schedule and by in fact so adhering. Petitioners sought damages on behalf of all sellers of residential real estate injured by the conspiracy in the amount by which the price-fixing conspiracy inflated residential real estate commissions in Los Angeles

County between 1966 and 1970, trebled pursuant to Section 4 of the Clayton Act, plus costs and reasonable attorney's fees. Without the aid of discovery, the complaint, estimated the aggregate amount of damages at $250,000,000.00, trebled to $750,000,000.00; it also alleged that amounts of damages arising from individual sales were not sufficient to warrant individual actions. Federal jurisdiction was based upon 28 U.S.C. Section 1337 and 15 U.S.C. Section 15.

The suit was filed against the Los Angeles Realty Board, a trade association with approximately 2,000 broker-members, and 32 named defendant real estate broker-members as representatives of the class of broker-members of the Board. The defendants admitted that the Board prepared and distributed the schedule of minimum commissions to the members of the Board, but they denied that they were participants in a conspiracy to fix commission rates within Los Angeles County.

The commission schedule distributed by the Board to its broker-members in the annual "Diary and Reference" (the 1969 version of which was before the Court of Appeals at pages 1252-1259 of the Clerk's Transcript) stated in its "Foreword" as follows:

> "That, as an act of accommodation to Realtors, property owners and public officials who may be confronted with the problem of determining a reasonable fee for the services of Realtors, the Los Angeles Realty Board hereby expresses its judgment that the fees listed in the schedule hereinafter set forth are reasonable fees to be charged and paid for normal transactions in the Los Angeles area of the State of California.

> "It should be understood that no member of the Los Angeles Realty Board, or any other Realtor is in any way bound by this Schedule. The amount of the commission on any real estate transaction is a matter for the parties to that transaction and is in no way subject to the control of the Los Angeles Realty Board."

Thereafter, the schedule set forth the recommended commissions to be charged in every conceivable type of real estate transaction. The recommended commission rate for sales of residential real property was six percent.

Respondents estimated that the approximate number of plaintiffs who paid commissions to members of the Los Angeles Realty Board between 1966 and 1970 was 400,000. As of the date of the district court's order certifying the plaintiffs' and the defendants' classes, petitioners had not conducted discovery to establish more precisely the number of individuals potentially represented within the plaintiffs' class. The approximate number of members of the Los Angeles Realty Board and, therefore, the approximate number of defendants represented within the defendants' class was 2,000.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals' Decision Is in Conflict With the Decisions of This Court Construing Rule 23 in Antitrust Cases.

In reversing the class certification order of the district court in its entirety, the Court of Appeals invalidated both the proposed class of plaintiff sellers of residential real estate and the proposed class of defendant broker-members of the Los Angeles Realty Board. However, in so doing, the court precluded all class actions in the Ninth Circuit in cases seeking treble damages for antitrust violations.[1]

The Court of Appeals held that class actions are "inappropriate" in cases seeking treble damages under the Sherman and Clayton Acts and, on that basis alone, invalidated the plaintiffs' class.[2] Analogizing to recent decisions construing the Truth In Lending Act

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[1]Judge Duniway's concurring opinion goes even further. He suggests that any large class action, in which one or a small number of plaintiffs seek to sue as representatives of a large class of persons who have not brought individual actions, should be banned and that the attorneys representing the plaintiffs' class breach the ethics of the State Bar simply by virtue of their filing and pursuing the litigation. Suing on behalf of a class of plaintiffs pursuant to Rule 23, we are told, constitutes "barratry," "solicitation," and a violation of the "centuries old policy of the law against stirring up litigation." (Concurring opinion, Appendix A, pp. 24-25.)

[2]Although the court addressed itself in its opinion to other bases for reversing the district court's order, these other reasons, properly analyzed, applied only to the defendants' class and not to the plaintiffs' class. The court's opinion also failed to distinguish between the plaintiffs' class and the defendants' class in its analysis. *See infra*, pp. 21-22.

of 1968, 15 U.S.C. Section 1601 *et seq.*, the court reasoned as follows:

> "This court stated in *Lamar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973):
>
> > 'The clear trend of authority for actions alleging a violation of the Consumer Credit Protection Act . . . holds that class actions are inappropriate.'
>
> "We find that the same reasoning applies to treble damage actions under the Sherman and Clayton Acts. Under these statutes compensatory damages must be trebled. . . . The trebling of damages in such cases is a statutory punitive measure. As expressed by Judge Learned Hand in *Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184, 189 (2d Cir.), *cert denied*, 350 U.S. 825 (1955), '. . . two-thirds of the recovery is not remedial and inevitably presupposes a punitive purpose.' The intent of Congress under Section 4 of the Clayton Act, 15 U.S.C. §15, appears to have been to impose punishment upon the violator of the [sic] Section 1 of the Sherman Act for his own malefactions not to subject him to vicarious liability by the coincidence of a class action for the staggering damages of the multitude." (Appendix A, p. 17.)

Thus, the clear import of the Court of Appeals' decision is that class actions seeking treble damages for alleged antitrust violations under the Sherman and Clayton Acts are precluded.[3]

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[3]The consequences of the Ninth Circuit's decision are already manifest. In *Marks v. San Francisco Real Estate Board*, CCH Trade Reg. Reports, ¶60,182 (February 24, 1975), attached

Recent decisions of this Court are clearly to the contrary—class actions may be maintained in suits alleging antitrust violations and seeking treble damages. See *Hawaii v. Standard Oil Company of California,* 405 U.S. 251 (1972); *American Pipe and Construction Company v. Utah,* 414 U.S. 538 (1974); *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974).

In *Hawaii v. Standard Oil Company of California, supra,* while holding that Section 4 of the Clayton Act did not authorize a state to sue for damages for injury to its economy caused by antitrust violations because such injury was not an injury to "business or property" under the Act, this Court recognized the general importance of private enforcement of the antitrust laws and specifically recognized the efficacy and propriety of antitrust class actions:

> "Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 U.S.C. §1337; 15 U.S.C. §15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more

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hereto as Appendix C, District Judge Albert C. Wollenberg, basing his ruling on the Ninth Circuit's decision in the instant case, reversed his earlier class certification order and held that the action could not be maintained as a class action. The *Marks* case was brought on behalf of 13,000 persons who paid brokerage commissions in connection with the sale of residential property to member-brokers of the Marin County Board of Realtors, Inc. The action was brought against the board and certain of its member-brokers who were named as defendants; no defendants' class was alleged. The suit alleged that the defendants had conspired to fix brokerage commissions in violation of the Sherman Act.

> powerful litigation posture. . . . The fact that a successful antitrust suit for damages recovers not only the costs of litigation, but also attorney's fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits. "*Parens patriae* actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area. Rule 23 provides specific rules for delineating the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries." (40 U.S. at 266.)

The ruling of the Ninth Circuit in the instant case precluding class actions in treble damage suits under the Sherman and Clayton Acts may not be squared with this Court's pronouncements in *Hawaii v. Standard Oil Company of California* and will, if sustained, put an end to one of the most effective tools for private enforcement of the antitrust laws. The Ninth Circuit has put competitors on notice that a conspiracy in restraint of trade is exempt from remedy through a class action.

Nor is the Court of Appeals' decision consistent with *American Pipe and Construction Company v. Utah, supra,* or *Eisen v. Carlisle & Jacquelin, supra.* In *American Pipe,* while affirming the decision of the Ninth Circuit denying class action certification in a Sherman Act case because the class was not sufficiently numerous, this Court adopted the rule that the statute of limitations applicable to individual members of the class is tolled by the filing of a class action. This ruling

was "necessary to insure effectuation of the purposes of legislative efficiency and economy that the Rule [Rule 23] in its present form was designed to serve." (414 U.S. at 556.) And in *Eisen*, this Court held that the literal requirements of Rule 23 must be met in antitrust class actions, but the appropriateness of class actions in the context of treble damage actions was not questioned, and this Court made its ruling "without prejudice to any efforts petitioner may make to redefine his class. . . ." (417 U.S. at 179, fn. 16.)[4]

If the Court of Appeals' opinion stands in the instant case, no class action seeking treble damages on behalf of plaintiffs injured by a conspiracy in violation of the Sherman Act can be maintained. Any such action would suffer from the fatal defect that it sought to subject individual defendants to liability for aggregated treble damage claims because, as even the Ninth Circuit apparently concedes, joint and several liability of co-conspirators is a well-settled concept in the antitrust law. (See *City of Atlanta v. Chattanooga Foundry & Pipeworks* (6th Cir., 1903), 127 Fed. 23, aff'd 203 U.S. 390 (1906); *State of Washington v. American Pipe & Construction Co.* (W.D. Wash. 1968), 280 F.Supp. 802, 804.)

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[4]Of course, this Court is not alone in sustaining the efficacy of class actions as the means of prosecuting the claims of many plaintiffs injured by antitrust conspiracies. Indeed, in cases identical to the instant case, motions to certify the actions as class actions have been sustained. (*See, e.g. Forbes v. Greater Minneapolis Area Board of Realtors*, 61 F.R.D. 416 (D. Minn. 1973), decision of District Judge Earl R. Larson. The Eighth Circuit declined to accept an interlocutory appeal of the class certification order under 28 U.S.C. §1292(b).)

The Ninth Circuit's reliance upon the truth-in-lending cases is misplaced. If class actions are inappropriate in cases involving violations of the Truth in Lending Act, it is because that Act authorizes minimum recoveries of $100.00 for each plaintiff regardless of any actual damages suffered by each plaintiff (15 U.S.C. Section 1640(a)), and the aggregation of such claims in a class action can produce a liability of defendants which is totally unrelated to any damages suffered by the members of the plaintiffs' class.

In *Ratner v. Chemical Bank of New York Trust Company*, 54 F.R.D. 412 (S.D. N.Y. 1972), upon which the Ninth Circuit opinion relies, the suit sought to redress a purely technical violation of the Truth in Lending Act which had caused no actual damages and to recover the minimum $100 statutory penalty for each of the 130,000 members of the plaintiffs' class. The district court in *Ratner* rejected the class action motion, but it expressly distinguished between Truth in Lending Act cases involving technical violations causing no actual damages and Sherman Act cases involving price-fixing conspiracies causing real injury to the marketplace and to the individual plaintiffs. (*Id.* at 416, fn. 7.) In Sherman Act conspiracy cases, no plaintiff can recover unless he can prove that he suffered actual injury on account of a violation of the antitrust laws.

To summarize, the Ninth Circuit has invalidated the plaintiffs' class in the instant case upon grounds which invalidate all class actions in cases alleging Sherman Act conspiracies and seeking treble damages. On the basis of a sketchy and ill-considered analysis, the Court of Appeals has dealt a fatal blow to the most effective vehicle for the private enforcement of the antitrust laws.

2. The Standards for Interlocutory Appellate Review of Rule 23 Class Certifications Should Be Articulated by This Court.

In its interlocutory review of the class certification order, the Ninth Circuit considered itself free to make a number of factual and legal assumptions which (i) preempted the trial judge's discretion to manage the litigation, (ii) pre-judged the substantive issues on the merits (while claiming not to reach a decision on the merits), and (iii) evaluated the question of manageability solely on the basis of the size of the class. In so doing, the appellate court has applied a standard of review which is inconsistent with the purpose and procedures of Rule 23.

In denying class status both to the plaintiffs' and defendants' class, the appellate court, relying solely on the speculations of respondents, assumed that the action would go to trial with a class of 400,000 or more sellers of residential real property seeking damages for an alleged price-fixing conspiracy against approximately 2,000 real estate brokers. Moreover, the appellate court assumed that the only method of proof of this conspiracy would require individualized evidence against each broker, and that each of the 2,000 brokers would take the witness stand and deny his participation in the conspiracy.

At this preliminary juncture of the litigation, when merit discovery has not even begun,[5] petitioners cannot categorically deny the possibility of the Ninth Circuit's speculations. However, it is at least as likely that discovery will uncover facts which will enable petition-

[5]At the request of the respondents, discovery was effectively limited to class action questions. [CT 119-121.]

ers to establish a *prima facie* case against the respondents without the need of individualized proof.[6] It is also a possibility, without conceding any impropriety in the class certified by the district court in this case, that merits discovery will indicate that the action may more appropriately proceed with various subclasses. Speculations by the appellate court of an unmanageable trial should not be dispositive at this early stage of the proceedings, particularly when the district court, which must live with this case, has found it to be manageable.

The standard of review applied by the reviewing court ignored the trial judge's preliminary exercise of discretion under Rule 23. Class determinations under Rule 23 are subject to modification and change within the sound discretion of the trial court under the plain language of the Rule. Subdivision (c)(1) provides that an order permitting a class action "may be conditional and may be altered or amended before the decision on the merits." Subdivision (d) also provides that orders relating to class actions "may be altered or amended as may be desirable from time to time."

As class action litigation progresses through the trial court, the trial judge has the discretion to alter or amend his earlier class action certification so that the

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[6]Since merit discovery has not begun, it is impossible for petitioners to know the exact nature of the evidence regarding the alleged conspiracy. Such evidence might disclose that all of the members of the Los Angeles Realty Board met and agreed to charge a uniform commission on the sale of residential property and to disseminate a suggested price list through the Realty Board to all of its members. Such a meeting might have been transcribed or recorded in the minutes of the Realty Board. This evidence, coupled with the fact that price lists were in fact distributed, would certainly constitute a *prima facie* case of liability against all of the respondents.

use of a class procedure can secure the just, speedy, and inexpensive determination of the action. That is the stated goal of the Federal Rules of Civil Procedure. Rule 1 F.R.Civ.P. Thus, subdivision (c)(4) of Rule 23 provides that:

> "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues or (B) a class may be divided into subclasses, and each subclass treated as a class, and the provisons of this rule shall then be construed and applied accordingly."

Mr. Justice Douglas noted in his partial dissent in *Eisen, supra,* the importance of the flexibility of class actions:

> "The purpose of Rule 23 is to provide flexibility in the management of class actions, with the trial court taking an active role in the conduct of the litigation. [Citations] Lower federal courts have recognized their discretion to define those subclasses proper to prosecute an action without being bound by the plaintiff's complaint. [Citations] And, as Rule 23(c)(1) clearly indicates, the courts retain both the power and the duty to realign classes during the conduct of an action when appropriate." (417 U.S. at 184.)

The class determination must not be set in concrete. Flexibility is essential because initial determinations of class action status under subdivision (c)(1) must be made "as soon as practicable after the commencement of an action brought as a class action." Normally, class action determinations are made prior to discovery on the merits. That was the practice followed by the district court below. As new facts are discovered and legal

theories changed, the trial judge is free to reassess his initial class certification to insure that the goal of judicial efficiency manifest in Rule 23 is realized.

Thus, class action determinations are left largely to the discretion of the trial judge, who is on the firing line and must live with his determination if he certifies class action status. The district court's responsibility to redefine and realign classes, to form subclasses, and to determine whether only certain issues are appropriate for class adjudication procedures, is justified by the court's continuing control over the litigation and its intimate knowledge of the facts of the case and the manner in which counsel are developing and presenting facts on behalf of the classes before the court.

The Court of Appeals' blanket reversal of Judge Gray's class certification has nullified the discretionary power of the trial court under Rule 23 and has exceeded the proper scope of appellate review of class action certification. The opinion of the Court of Appeals does not even speak to the question whether the trial court can establish different subclasses or otherwise amend or modify its class action ruling in this case. Instead, the Ninth Circuit peremptorily closes the door to further processing of this case under Rule 23, preventing petitioners from going forward with a class action on behalf of some of the members of their class or against a portion of the class of defendants certified by the district court. The Ninth Circuit has short-circuited the trial court's necessary power properly to manage Rule 23 litigation.

An additional implied premise of the Court of Appeals in its review of the class action certification is that the petitioners are obliged to marshal and present

to the trial court all of their evidence on the liability issue in advance of trial. This additional requirement imposed by the reviewing court necessitates that petitioners try the merits of their litigation before the trial begins in order to permit a class certification to withstand appellate scrutiny in a Section 1292(b) review.

The Ninth Circuit, after summarizing the preliminary discovery evidence and the allegations of plaintiffs' complaint, made conclusions on the ultimate merits of the litigation. The court observes that "the printing of a price schedule and its distribution to members is not enough to establish civil or criminal liability." (Appendix "A", p. 12.) Additionally, ignoring the fact that merit discovery has not been undertaken, the Ninth Circuit makes an appellate finding that "we cannot be persuaded that in this case proof of conspiracy or proof of illegal conduct of each defendant may be accomplished by generalized means." (Appendix "A", p. 13.)[7]

In this same context, although the Ninth Circuit observes that parallelism does not conclusively establish liability (Appendix "A", p. 13), the court ignores the fact that conscious parallelism in pricing, coupled with the existence of a price schedule distributed to all members of a trade association and proof of adherence to that schedule, would be sufficient to establish liability.

While making these determinations on the ultimate merits of the litigation, the Ninth Circuit gives lip service to neutrality on the ultimate facts in dispute, indicating that "we intimate no judgment on the merits."

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[7]The type of factual possibility described in footnote 6, *supra*, was obviously never considered by the reviewing court in making this determination.

(Appendix "A", p. 20.) This disclaimer at the conclusion of the opinion cannot alter the fact that the court applied an improper standard of review throughout its opinion.

The question presented by the Ninth Circuit's approach is whether plaintiffs commencing class action litigation must prove their case on the merits before the class action certification hearing in the district court. In *Eisen v. Carlisle & Jacquelin, supra,* this Court noted that a preliminary determination on the merits of a class action contravenes the procedures provided in Rule 23:

> "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether the action may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of a class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such [sic] soon as practicable after the commencement of [the] action. . . ." (417 U.S. at 177-178.)

Thus, the decision below presents a double threat to sound judicial administration of class actions. First, the decision threatens to increase the volume of interlocutory appeals from class action certifications under

Rule 23 because it offers to defendants virtually a trial *de novo* on the preliminary determination of the trial judge. Second, it undermines the trial judge's discretion under Rule 23 and compels just the kind of mini-trial on the merits which was disapproved by this Court in *Eisen, supra.*

The Ninth Circuit's decision is also based erroneously on the premature and unsupported appellate finding that the substantial size of both the plaintiffs' and defendants' classes made the litigation unmanageable. The size of a class, standing alone, should not form the basis on which to deny class status, particularly in an action alleging a price-fixing conspiracy. If size alone justified denial of class certification in Sherman Act cases, competitors, by joining into large enough trade associations and engaging in massive price-fixing conspiracies causing substantial injury to large numbers of people, could circumvent the class action remedies provided for in Rule 23. Moreover, if the amount of the injury, though substantial, was not, as a practical matter, sufficient to enable an individual to pursue litigation against the defendants, there would be no remedy in damages available to members of the injured class.

In considering the manageability of the instant action, it is important to note that the size and scope of the plaintiffs' and defendants' classes were not created by the whim of the petitioners or their attorneys. The defendants' class consists of the membership of a single trade association in a single county, and the plaintiffs' class consists of those persons injured as a result of the price-fixing conspiracy among the defendants.

Size alone, even though it is substantial, should not render either a plaintiffs' or defendants' class unman-

ageable. This is especially true where a conspiracy is alleged, and the fact of the conspiracy creates a common question which underlies the entire litigation. The manner of proving the conspiracy might raise factual questions, but the existence of the conspiracy itself is a single issue which can be determined through a class action and which raises questions of law and fact common to the members of a class of plaintiffs. Even the question of the individual participation in the conspiracy of particular defendants, the question which so confounded the Court of Appeals, raises issues common on the members of the plaintiffs' class because each conspiring defendant is jointly and severally liable to each injured plaintiff.

Issues of size may have a varying impact depending upon whether it is a plaintiffs' or a defendants' class that is being reviewed. In the instant case, the Ninth Circuit failed utterly to distinguish between the plaintiffs' and the defendants' classes, and simply invalidated both on grounds of "unmanageability" without ever considering whether the size of each particular class in fact rendered class treatment unmanageable. The Court endlessly repeated its concern that 2,000 defendants might testify in their own defense to deny participation in the conspiracy, and, on the basis of that concern, the Court invalidated both classes even though such defensive evidence raises individual questions of fact and law only with respect to the defendants' class. Because of the joint and several liability of defendant co-conspirators to the members of the plaintiffs' class, such defensive evidence is common with respect to the members of the plaintiffs' class.

In assessing the manageability and efficiency problems presented in a class action—and some such prob-

lems are inherent in every class action—the alternative to class action treatment must be recognized and its drawbacks must be weighed against the problems perceived in the class action. The Manual for Complex Litigation lucidly explains the policy:

> "Where a (b)(3) class action is brought, one of the findings the court must make is 'that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.' One of the factors pertinent to such finding is '(D) the difficulties likely to be encountered in the management of a class action.'
>
> "Particularly in consumer class actions, where the potential or actual class members may number in the millions, the assertion of unmanageability is typically pressed upon the court. In considering whether the proposed class action is 'superior,' the court must make a realistic evaluation of the 'other available methods,' keeping in mind the purposes for which amended Rule 23 was designed. For it is just such situations where representative treatment may be most needed, since separate suits by the many plaintiffs or against the many defendants would pose an intolerable burden on the party opposing the class as well as the judicial system; and denial of the class action might well mean a total denial of relief as a practical matter for the persons injured.
>
> "Rule 23 grants to the court broad discretionary powers to enable the court successfully to solve the novel administrative problems posed in a class action by the unusually large number of members of the class, each of whom may have small monetary claims." (1 Moore's Federal Practice, Man-

ual for Complex Litigation, Section 1.43, pp. 36-37; see also, *In re Antibiotic Antitrust Actions*, 333 F.Supp. 278 (S.D. N.Y., 1971).)

Mr. Justice Douglas, in a partially dissenting opinion in *Eisen, supra,* expressly noted the fact that class actions may well represent the only available remedy for large groups of individuals injured by the identical conduct of more powerful defendants:

> "I agree . . . that a class action serves not only the convenience of the parties but also prompt, efficient judicial administration. I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected. Some of these are consumers whose claims may seem *de minimis* but who alone have no practical recourse for either remuneration or injunctive relief. . . .
>
> "The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth." [footnotes omitted.] (417 U.S. at 185-186.)

Petitioners submit that the Ninth Circuit's decision equating the size of the class with its manageability is not founded upon a reading of Rule 23, but rather upon a manifest hostility to the very existence of the Rule. There is no indication that the drafters of the Rule contemplated that manageability would be a mathematical function of the size of the class. In

fact, in the Comments to the Rule, the drafters expressly noted that a fraud perpetrated on numerous persons by use of similar misrepresentations might be an appealing situation for a class action, while a mass accident might involve significant individual questions, both of damages and liability. In discussing private damage claims by numerous individuals arising out of concerted antitrust violations, the drafters indicated such actions might or might not involve predominating common questions. Nowhere in the drafter's Comments to Rule 23 is the size of a class the critical component in the manageability question. If size were such a component, then a scheme to defraud millions of people out of a few dollars each would be beyond the reach of the courts. In the instant situation where damages will probably amount only to several hundred dollars per person, it is unlikely to believe that a competent class action/antitrust attorney would handle an individual action even though reasonable attorney's fees would be granted by the court.[8]

This Court, in *Eisen*, dealt with several limited questions regarding class actions, viz. the appealability of a class action order, and questions involving notice requirements to the class. In a partially dissenting opinion, Mr. Justice Douglas, joined by Justices Brennan and Marshall, considered further ramifications of Rule 23. A majority of this Court has never considered the problems raised by this petition concerning the proper scope of appellate review of class action certifications. Such a determination should be made so that unneces-

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[8]Numerous courts have indicated that one factor to be considered in awarding attorney's fees in treble damage actions is the amount recovered by the plaintiff. See, for example, *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir., 1964), *cert. den.* 379 U.S. 880.

sary appeals and inconsistent adjudications can be avoided and to redress the inappropriate and overbroad approach taken by the Ninth Circuit.

3. The Court of Appeals' Decision Is in Conflict With the Decisions of This Court Delineating the Requisite Proof of an Antitrust Conspiracy.

While disclaiming the intention to render any judgment on the merits of this action (Appendix "A", p. 20), the Ninth Circuit's opinion relies upon a recitation of the substantive antitrust law which is inconsistent with well-established law promulgated by this Court in *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950) and *Interstate Circuit v. United States*, 306 U.S. 208 (1939).

In *National Association of Real Estate Boards*, the United States brought suit against the National Association of Real Estate Boards, the Washington Real Estate Board, and fifteen members of the Washington Real Estate Board, alleging a conspiracy to fix real estate brokerage commissions. The United States proved that the Washington Real Estate Board adopted and distributed to its members a schedule of commissions, that the code of ethics of realtors included the obligation of members to adhere to the fee schedule, that the members adhered to the schedule in the majority of their real estate transactions, but that no sanctions had been imposed for departure from the recommended rates. On the basis of this evidence, the district court entered judgment for the defendants, and this

Court reversed, holding that the evidence was sufficient to prove a restraint of trade on the part of the Washington Real Estate Board and the adhering members:

> "Enough has been said to show that under our decisions an illegal price-fixing scheme has been proved, unless the fixing of real estate commissions is not included in the prohibitions of §3 of the Act. Price-fixing is *per se* an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. *An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve.* That is the teaching of an unbroken line of decisions. [Citations] And the fact that no penalties are imposed for deviations from the price schedules is not material. [Citations] Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line." (339 U.S. at 488-489.) (Emphasis added.)

Despite this clear language, the Ninth Circuit construed the case to require both "an agreement" *and* "adherence or consensual approval." (Appendix A, p. 12.) This Court held that evidence of adherence to a price schedule *or* proof of consensual action would be sufficient to show the requisite *agreement* in restraint of trade. If there is proof that members of a trade association knowingly adhered to a fee schedule, no further proof of an agreement is required.[9]

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[9]Commentary on the decision of the Ninth Circuit in the instant case recognizes the apparent failure of the Court of Appeals to follow this Court's decision in *National Association*

(This footnote is continued on next page)

This Court held to the same effect in *Interstate Circuit:*

> "While the District Court's findings of an agreement of distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. . . .
>
> "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. [Citations] Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." (306 U.S. at 226-227.)[10]

The Ninth Circuit also erroneously suggests that the absence in the instant case of a written obligation of brokers to adhere to the commission schedule is sufficient to distinguish the facts at bar from those in

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of Real Estate Boards. See BNA, Antitrust & Trade Regulation Reports, No. 696, January 14, 1975, News and Comment, page A-18.

[10]The Ninth Circuit has, itself, recognized that a conspiracy in violation of the Sherman Act may be proved without showing an express agreement—that knowing adherence to a price schedule is conduct sufficient to establish the element of agreement required by the Sherman Act. *See Esco Corporation v. United States* (9th Cir., 1965) 340 F.2d 1000, 1008.

National Association of Real Estate Boards. However, this Court made clear that it was adherence to the fee schedule and not proof of formal sanctions which was critical in the proof of the illegal conspiracy in *National Association of Real Estate Boards.* The language of the Ninth Circuit would permit competitors to form trade associations, to distribute minimum fee schedules, and to knowingly adhere to those schedules, all without liability, so long as the schedule itself did not compel members to adhere. Thus, through the use of self-serving and exculpatory language such as that found in the Foreword to the schedule of commissions of the Los Angeles Realty Board, conspiracies in restraint of trade would avoid the impact of the antitrust laws.[11]

The Ninth Circuit erects a straw man when it declares that proof that broker A adhered to the commission schedule in the majority of his transactions will not suffice to show that broker B did so. (Appendix "A", p. 13.) This is, of course, true, but petitioners never contended to the contrary. What petitioners contended and what this Court held in *National Association of Real Estate Boards* and *Interstate Circuit* was that proof that the Board distributed the commission schedule to its members combined with proof that

[11]This Court should not lose sight of the fact that, at the request of respondents, petitioners herein were limited by the district court to discovery pertaining to the class action questions, and that no merits discovery was permitted with respect to the reasons for the adoption of the exculpatory language in the Foreword and the circumstances surrounding the adoption of that language. It is possible, for example, that such discovery would disclose a meeting of members of the Los Angeles Realty Board wherein it was agreed to modify the Foreword in order to cloak the illegal purposes of the fee schedule. Certainly, without evidence on this issue, the Ninth Circuit could not rely upon the Foreword to exculpate the Board or its members.

the members knowingly adhered to the schedule in the majority of their real estate transactions would suffice to establish *prima facie* that those adhering members conspired with the Board to fix prices in violation of the Sherman Act.

Conclusion.

For the foregoing reasons, it is urged that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Date: March 19, 1975.

APPENDIX "A".

Opinion.

United States Court of Appeals for the Ninth Circuit.

Richard Kline, Margo Kline, Martin Sherman, Florence Sherman, and Martin Simon, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees, vs. Coldwell, Banker & Co., Realtors, et al. Defendants-Appellants. No. 73-2169.

Filed December 20, 1974.

Appeal from the United States District Court
from the Central District of California

Before: DUNIWAY and TRASK, Circuit Judges, and POWELL,* District Judge.

TRASK, Circuit Judge:

In this proceeding under the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b), we are called upon to decide by means of an interlocutory appeal whether this suit may be maintained as a class action under Rule 23, Federal Rules of Civil Procedure. The action was brought by plaintiffs Richard and Margo Kline, husband and wife, on behalf of themselves and all sellers of residential real estate in Los Angeles County against the Los Angeles Realty Board and its several divisions and 32 named real estate brokers representing a class consisting of all real estate brokers who were members of the Board during the 4-year period prior to the filing of the action.

Plaintiffs allege that the Board and its members conspired in violation of section 1 of the Sherman Act,

*Honorable Charles L. Powell, Senior United States District Judge for the Eastern District of Washington, sitting by designation.

15 U.S.C. § 1, to fix brokerage commissions through distribution of a recommended fee schedule to its members. Plaintiffs claim that the fee schedule fixed commissions at a higher rate than it would have been absent the schedule causing damage to plaintiffs which they are entitled to have trebled under section 4 of the Clayton Act, 15 U.S.C. § 15. During the 4-year period involved, approximately 800,000 deeds were recorded in Los Angeles County. Based upon this fact defendants estimated that upwards of 400,000 sales with approximately that number of plaintiffs could well be involved in this class suit.[1] By virtue of the alleged conspiracy and the damages sustained the plaintiffs prayed for a judgment against the defendants as a class and each of them individually totaling $250,000,000 actual damages trebled to $750,000,000, or according to the proof adduced at trial, together with a reasonable attorney's fee and costs of suit.

More than 2,000 brokers who were members of the Los Angeles Realty Board and its divisions performed services during the 4-year period in the sale of residential property which is defined as any lot or parcel of real property improved with from 1 to 12 dwelling units. Defendants denied participating in any conspiracy. The defendant Board admitted publishing and distributing a commission schedule but denied that any member was required to follow it. The fee schedule suggested a commission of 6 percent of the total purchase price. The foreword of the schedule states in part:

> "It should be understood that no member of the Los Angeles Realty Board, or any other Real-

[1]The plaintiffs did not disagree but suggested at oral argument as a word of caution that there might be more.

tor is in any way bound by this Schedule. The amount of the commission on any real estate transaction is a matter for the parties to that transaction and is in no way subject to the control of the Los Angeles Realty Board."

The trial court received a motion for certification of the action as proper under Rule 23. After having considered the motion, the opposition, voluminous supporting documents and filings and after having heard extensive argument, the District Court granted the motion in part and denied it in part to the following effect:

(1) The named plaintiffs Richard and Margo Kline, husband and wife, were found to be representative of a class of all persons who sold residential property within Los Angeles County, California, during the period September 24, 1966, to September 23, 1970, and used the services of one or more of the named defendant real estate brokers or brokerage firms or any members of the Los Angeles Realty Board (including its divisions) and compensated said brokers or firms for their services.

(2) The 32 named defendant real estate brokers and brokerage firms together with the Los Angeles Realty Board and its branches were determined to be representative of a defendants' class of all real estate brokers who during the same period were members of the Los Angeles Realty Board including its branches and who acted in that capacity in connection with the sale of residential real property.

(3) The District Court denied Martin Simon status as a representative of a class of "unsuccessful sellers of real property," because it would have been inappropriate under Rule 23.

(4) The court also denied representative status to sellers of commercial and industrial property.

The court's two findings of representative status were based in part on its determination that the central issue concerned whether there was a conspiracy entered into by the defendants to fix prices for commissions in sales of residential real property in Los Angeles County. This issue, the court found, presented common questions of law and fact which predominated over any questions of law and fact affecting only individual members of the classes. A sub-issue, ruled the court, was whether there was a schedule of commissions prepared, published and distributed by the defendants and whether said schedule was substantially adhered to by the broker defendants. This central and sub-issue should not have to be tried on more than one occasion, said the court, and although individual issues did exist such as whether the individual brokers knew of the schedule and whether they conformed to it, these individual issues did not predominate over the common issues of law and fact. The court having concluded that its order involved a controlling question of law as to which there was a substantial ground for difference of opinion, certified it for immediate appeal under 28 U.S.C. § 1292(b). This court has entered its order permitting the appeal.[2] Defendants appeal the District Court's order finding the case to be proper class action.

Without expressly so stating, the parties appear in agreement that whether this is a proper class action is

[2]Although questions were raised as to the application of the Interlocutory Appeals Act to the order of the trial court certifying the appeal as an interlocutory one, those questions were briefed by counsel on both sides and the order granting permission to submit an interlocutory appeal was granted by another panel of this court. We do not further examine that question.

to be determined under Rule 23(b)(3). We are in accord.[3] Rule 23(b) first requires that the prerequisites of Rule 23(a) must first be satisfied. They are (1)

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[3]Rule 23(b) states in pertinent part:

"(b) . . . An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . .

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

As originally enacted, Rule 23 would not have accommodated a suit like that filed here. It provided only for a "true class suit" where, but for the rule, the joinder of all interested persons would have been essential, 3 B. J. Moore, Federal Practice (1974) ¶ 23.08; the "hybrid" class suit where the interests of the parties were several but concerned a specific property, *id.* ¶ 23.09; and, the "spurious" class suit where there was no jural relationship between the parties but a common question of law or fact existed. Such an action was an invitation to those having such an interest to join but not a requirement that they accept. *Id.* ¶ 23.10. The importance of Rule 23 at this time was not outstanding. In 1966 the rule was amended to provide a more flexible remedy. Recoveries would be available for or on behalf of all members of the class and the judgments binding upon all provided the requirements of the rule were met. The popularity of class actions increased fourfold within a period of four years and developed a host of champions and critics. *Compare* Blecher, *Is the Class Action Rule Doing the Job? (Plaintiff's viewpoint)* with Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 365, 375. The courts have had their own difficulties in solving the problems generated by the rule. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) (Eisen I); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (Eisen II); and Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 42 U.S.L.W. 4804 (May 28, 1974) (Eisen III).

(This footnote is continued on next page)

that the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. The propriety of the certification of both plaintiff and defendant classes and of the class action in general must be measured against these requirements.

It appears clear that prerequisites (1) and (2) are satisfied by both classes; no question has been raised as to the adequacy of representation under (4). Although Mr. and Mrs. Kline represent some 400,000 sellers, they are sellers who have employed one of the defendant class members; there are 32 named brokers and brokerage corporations as well as the Los Angeles Realty Board and its branches as defendants, and it can well be assumed that the other 2,000 defendants are adequately represented by them. Whether the claims or defenses of the representatives of the named parties are typical of all the claims and defenses of the absent members of the two classes will be considered under

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The Supreme Court at the last term, October 1973, passed upon two cases involving the scope of class actions. Zahn v. International Paper Co., 414 U.S. 291 (1973), held that a diversity action seeking damages could not be maintained on behalf of unnamed plaintiffs whose claims did not meet the jurisdictional amount requirements. Eisen v. Carlisle & Jacquelin, 42 U.S.L.W. 4804 (May 28, 1974), upheld the decision of the Court of Appeals in Eisen III, *supra*, that individual notice must be given to all identifiable members of the class at the plaintiff's expense and that a preliminary or "mini-hearing" on the merits to determine whether it might be maintained as a class action was improper.

Our own court has had more than one occasion to consider the problems of Rule 23 as amended. Most recently we have had before us LaMar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973), and In Re Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974).

subsection 23(b)(3), since to a considerable extent the criteria are similar. We consider, then, the additional requirements of Rule 23(b)(3). (1) Whether common questions predominate over individual ones, and (2) whether the action is "manageable."

I. *Whether the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.*

The crux of defendants' argument is that individual questions concerning the liability of each individual broker defendant and the injury of each individual plaintiff predominate over any common questions of a conspiracy. The plaintiffs adversely contend that they can prevail on a legal theory which avoids individualized issues of defendant liability, which establishes plaintiff injury in general, and which leaves the determination of the *quantum* of individual recovery to a mechanical process or to separate adjudication. In short, appellees argue that they can prevail on a *generalized* antitrust theory (utilizing "per se" rules) while the appellants deny this and argue that individual issues must be litigated. Resolution of this controversy requires an examination of substantive antitrust law.

In order to prevail under section 1 of the Sherman Act, 15 U.S.C. § 1, and to recover treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, the plaintiffs must prove both that the defendants' conduct contravened section 1 *and* that the plaintiffs suffered injury as a direct result of this illegal conduct.[4] Each of these two facets will be separately considered.

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[4] 15 U.S.C. § 1 states:

"§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

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a. Establishing illegal defendant conduct.

The appellees advance two theories under which they contend that they can establish illegal conduct without individualized proofs. Both theories are based upon trade association practices and can be called the

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"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

15 U.S.C. § 15 states:

"§15. Suits by persons injured; amount of recovery

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

"Membership-Ratification" theory and the "Adherence" theory. The former relies heavily upon *Phelps Dodge Refining Corp. v. FTC*, 139 F.2d 393 (2d Cir. 1943). That court said:

> ". . . [T]he issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to disassociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise and cannot disclaim joint responsibility for the illegal uses to which the association is put."

Since *Phelps Dodge* the "Membership-Ratification" theory has been reformulated by numerous courts including this Circuit. In each of these reformulations much of the stress falls upon the knowledge component. In *Riss & Co. v. Association of American Railroads*, 187 F. Supp. 306, 312-13 (D.D.C. 1960), the court said:

> "The individual . . . members of the associations can be held responsible for the unlawful conspiratorial acts or declarations of the associations only if they are shown *to have known and approved of such activities and of their unlawful objectives.*" (Emphasis added).

In *Vandervelde v. Put & Call Brokers & Dealers Association, Inc.*, 344 F. Supp. 118, 155 (S.D.N.Y. 1972), it was recently stated:

> "The key element of proof for linking an association member to the acts of his organization is a showing that *he knew of and condoned the act in issue.*" (Emphasis added.)

This court considered the issue in *Northern California Pharmaceutical Association v. United States,* 306 F.2d 379 (9th Cir.), *cert. denied,* 371 U.S. 862 (1962). That was a criminal case. The indicted defendants were the Association, an incorporated California trade association, and one Donald Hedgpeth. The members themselves were not parties to the proceeding as defendants and to this extent the case becomes dissimilar. Hedgpeth, a pharmacist, prepared a price schedule for non-compounded prescriptions which the corporation distributed to its members. In connection with the evidence required to convict the two defendants who were indicted the court said:

> "The co-conspirators are the Association as an active and independent legal entity, its officers, directors and committeemen insofar as they have carried on proscribed conduct, and those members of the Association who have *knowingly, intentionally and actively participated in an individual capacity in the scheme* which is said to result in the unlawful conspiracy. Thus, to the limited extent that it carries on unlawful activity, the Association is itself a sort of continuing agreement by which the fixing of prices might be effectuated. *This does not mean,* however, that *every member of the Association, by reason of his membership alone, becomes a co-conspirator.* Knauer v. United States, 237 F. 8, 19-20 (8th Cir. 1916). Knowledge and participation are required. Nor will

> proof of parallel business behavior alone conclusively establish agreement. Theatre Enterprises v. Paramount, 346 U.S. 537, 74 S.Ct. 257, 98 L. Ed. 273 (1954)." *Northern California Pharmaceutical Ass'n. v. United States*, 306 F.2d 379, 388-89 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962). (Footnotes omitted.) (Emphasis added.)

It thus clearly appears that in order for a member of a trade association to become guilty in a criminal case or liable in a treble damage case he must have "knowingly, intentionally and actively participated in an individual capacity in the scheme."

Plaintiffs' reliance upon this case and *Plymouth Dealers' Association of Northern California v. United States*, 279 F.2d 128 (9th Cir. 1960), to prove liability by continued membership is mistaken. In *Plymouth Dealers Association* the action was a criminal prosecution against the Association, a corporation. There, again, the court approved instructions which required the jury in order to convict to find that there was an agreement "that the defendant should formulate retail list prices for Plymouth motor cars" and "that the price schedules so agreed upon were a substantial part of the price structure used in the sale of Plymouth motor cars." *Id.* at 130 n.3. But the court in speaking of "the defendant," was referring only to the indicted corporate defendant, *i.e.*, the Dealers' Association. The liability vel non of the association members was not in issue because they were not defendants although they were described as co-conspirators. Nor is there any indication from the opinion that the dealer members were parties to any agreement.

We would read *Plymouth Dealers' Association* as elaborated by *Northern California Pharmaceutical Association* as establishing the law of this Circuit that the printing of a price schedule and its distribution to members is not enough to establish civil or criminal liability. Proof here, therefore, even by admission of the Realty Board that it prepared a suggested commission schedule and distributed it to its members does not establish the illegal conduct necessary for a recovery.

Plaintiffs also rely heavily upon *United States v. National Association of Real Estate Boards,* 339 U.S. 485 (1950). In that action the Supreme Court stated:

> "The Board's code of ethics provides that 'Brokers should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates.' Members agree to abide by this code." 339 U.S. at 488.

There is no evidence here of such an ethic or such an agreement. The Court went on to say:

> "Price-fixing is *per se* an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. *An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price,* is itself illegal under the Sherman Act, no matter what end it was designed to serve." *Id.* at 489. (Emphasis added.)

Thus the *Real Estate Boards* case would appear to require for a *per se* violation by members, (1) an agreement, (2) adherence or consensual approval. In fact, the Court declined to reverse a district court's finding

that two of the defendants, the National Association and one Herbert Nelson, were not participants in the conspiracy upon the basis that the code of ethics of the National Association, that the fee schedule "should be observed", was somewhat ambiguous. Said the Court, "It may be advisory only." *Id.* at 495.

So we cannot be persuaded that in this case proof of conspiracy or proof of illegal conduct of each defendant may be accomplished by generalized means. The legal significance of the written document and the rules or by-laws of the Realty Board and the method of compiling the document may indeed be a question of law and fact common to all defendants. But membership liability is inherently an individual question. It cannot be answered by generalized "Membership-Ratification" (mere continuation of membership) of any type suggested by appellees.

Plaintiffs have also misused the "Adherence" theory. Under this approach if Broker A receives the fee schedule and follows it in his pricing, Broker A would be liable as having adhered to the conspiracy. The fact that Broker A has adhered does not, however, prove that Broker B did so. Nor does the fact that a "substantial" number of brokers adhered prove that Broker B did so also. None of the cases cited by appellee establishes that mere parallelism conclusively establishes liability. *Northern California Pharmaceutical Association, supra,* holds to the contra. Once again, this issue involves individual questions and necessarily invites individual defenses. Each defendant is clearly entitled to come forward and prove that he did not know of the commission schedule or that he opposed it or ignored it or, perhaps, some other yet unknown defense.

On the question of the defendants' illegal conduct no adequate showing has been made that the questions of law or fact common to the members of the class predominate over the questions affecting individual members.

b. Establishing the plaintiffs' injury, i.e., the damages issue.

In order to certify the action as a proper class action it is necessary to demonstrate that the class action is superior to other available methods for the fair and efficient adjudication of the controversy as required by Rule 23(b)(3). Proof of injury is an essential substantive element of the successful treble damage antitrust action. *Gray v. Shell Oil Co.*, 469 F.2d 742, 748 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); *Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc.*, 346 F.2d 1012, 1014 n.1. (9th Cir.), *cert. denied*, 382 U.S. 958 (1965). Here there was apparently no showing made in support of the question whether "economic reality" might dictate that this action proceed as a class action or not at all. *Eisen v. Carlisle & Jacquelin*, 42 U.S.L.W. 4804 (May 28, 1974). The matter is not discussed in the briefs. The prayer for estimated damages indicates that in many instances the damages if recoverable would be substantial. The fact that sales of twelve unit complexes are included in the disputed transactions also points in that direction.[5] Thus the potential benefit to

[5]Assuming 400,000 transactions causing damage by excess commissions in the estimated sum of over $250,000,000 the average recoverable damage amounts to $625. Trebled, the individual recovery would amount to $1,875 and the aggregate to $750,000,000, the amount of the prayer. To arrive at that average figure, obviously many damage claims have been estimated that would result in a figure considerably in excess of that

the proposed class by the use of Rule 23 does not rise to the same dimension as those where the damage award sought is only $70, *Eisen v. Carlisle & Jacquelin, supra,* or $2, *In re Hotel Telephone Charges,* 500 F.2d 86 (9th Cir. 1974). It is also entirely probable that a goodly number of the total transactions would not be litigable for one reason or another;[6] and, of course, some of the larger brokers and brokerage firms could reasonably be expected over the 4-year period to have a substantial number of residential transactions which would be involved in a single action against that one defendant; and finally, some of the absentee plaintiffs might not desire to become involved in the litigation at all.

The allegation is that from the 400,000 to 800,000 transactions during the period in question damages will be proved in excess of $250,000,000, which trebled will aggregate $750,000,000. In addition, plaintiffs are asking for costs and attorneys' fees. All of these elements of recovery are within the provision of 15 U.S.C. § 15. The amounts are staggering. In addition, the prayer is for recovery against the defendants jointly and severally. *State of Washington v. American Pipe & Construction Co.,* 280 F. Supp. 802 (S.D. Cal.) *mandamus denied sub nom., American Pipe & Construction Co. v. Pence,* 393 F.2d 568 (9th Cir.) (unrelated issue), *cert. denied,* 393 U.S. 842 (1968). This means that the small individual operator faces a potential liability of

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average. Since attorneys' fees and costs are also recoverable in a successful 15 U.S.C. § 15 action, it may be safely assumed that a great many of the cases could be separately prosecuted.

[6]Affidavits of some defendants in the file vehemently assert that they did not follow the Board's suggestions; others may assert other defenses which would make litigation of a claim a poor plaintiff's risk.

upwards of three-quarters of a billion dollars for which all of his or her assets are responsible. The amount of a recovery in a lawsuit is not ordinarily of concern where a wrong has been inflicted and an injury suffered. But when 2,000 are joined in an action where each is jointly and severally liable, the liability is increased in geometric progression. Such an award against each of 2,000 real estate broker defendants would shock the conscience.

In somewhat similar circumstances, class actions have sought outrageous amounts in statutory penalty cases such as the $100 minimum under the Truth in Lending Act of 1968. *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972) (aggregate of $13 million sought); *Shields v. First National Bank of Arizona*, 56 F.R.D. 442 (D. Ariz. 1972) (aggregate of $100 million sought); *Alsup v. Montgomery Ward & Co.*, 57 F.R.D. 89 (N.D. Cal. 1972) (aggregate of $20 million sought in one consolidated case and $8 billion in another); *Gerlach v. Allstate Insurance Co.*, 338 F. Supp. 642 (S.D. Fla. 1972) (aggregate of approximately one billion dollars). In each case cited the district court denied class action treatment. Judge Frankel in *Ratner* among other reasons stated:

> "Briefly, if perhaps too broadly, stated, the reasons against maintenance of this as a class action are:
>
> "(1) there is no affirmative need or justification for such a proceeding in the actual circumstances of the case; and
>
> "(2) the allowance of thousands of minimum recoveries like plaintiff's would carry to

> an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement." 54 F.R.D. at 414.

This court stated in *LaMar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973):

> "The clear trend of authority for actions alleging a violation of the Consumer Credit Protection Act . . . holds that class actions are inappropriate."

We find that the same reasoning applies to treble-damage actions under the Sherman and Clayton Acts. Under those statutes compensatory damages must be trebled, *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 878 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). The trebling of damages in such cases is a statutory punitive measure. As expressed by Judge Learned Hand in *Lyons v. Westinghouse Electric Corp.* 222 F.2d 184, 189 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955), ". . . two-thirds of the recovery is not remedial and inevitably presupposes a punitive purpose." The intent of Congress under section 4 of the Clayton Act, 15 U.S.C. § 15, appears to have been to impose punishment upon the violator of the section 1 of the Sherman Act for his own malefactions not to subject him to vicarious liability by the coincidence of a class action for the staggering damages of the multitude. For example, if the sole enterprise real estate broker with a small suburban business finds that out of $10,000 in commissions he has earned in the year past, $1,000 has been determined to consist of overcharges for which in an antitrust action, he becomes obligated to pay $3,000 as treble damages. But because he joined

a Realty Board and received and followed suggestions as to proper commissions he is now obligated legally to pay $750,000,000. At some point the logic of the law leads in this situation to an ad absurdam result. We believe this is it.[7] In the light of the problems engendered by the requirement of proof of damages, we cannot find that under Rule 23 (b)(3) this class action is superior to other available methods for the fair and efficient adjudication of the controversy.

II. *Manageability of the Action.*

The final consideration for class action status involves the question of manageability under Rule 23(b)(3)(D), *i.e.*, "the difficulties likely to be encountered in the management of a class action." This problem was recognized by the Advisory Committee's Notes on the Proposed Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966), where the Committee discussed the types of cases which would generally qualify under the rule. It then by way of reservation pointed out that certain cases would be inappropriate as class actions stating as an example that a mass accident,

> ". . . resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways."

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[7]As pointed out in a slightly different context in Green v. Wolf Corp., 406 F.2d 291, 303 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969):

> "Punitive damages can be justified only as retribution or as a deterrent measure. Restatement, Torts § 908, Comment a; . . . The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.L. Rev. 1159 (1966)."

Here, as the plaintiffs state in their brief, they do not rely upon the "isolated fact of membership" in the Realty Board nor upon "mere conscious parallelism" of the members.

> "Rather, plaintiffs rely on a combination of these and other relevant factors: the Los Angeles Realty Board distributes a recommended fee schedule to its members; the members of the Board receive and have knowledge of the fee schedule and maintain their membership in the Board; and the members of the Board adhere to the 'suggested' fee schedule in fixing their brokerage commissions."

But this is only the plaintiffs' case as to an individual defendant. There are 2,000 defendants. Perhaps such evidence would establish a prima facie case. But the defendant would then have the right to come forward and submit his proof;[8] he may categorically deny some of the proof of the plaintiff or may submit matter in avoidance. This trial must repeat itself with individual differences some two thousand times as far as we can discern based upon the pleadings before us now. There

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[8]It has been suggested that generalized proof of damages might suffice under Rule 23. But the Rule does not eliminate the ultimate need for individual proof of damages by each member of the class. Nor does it foreclose the right of each defendant to assert his defenses before a jury if one is requested.

28 U.S.C. § 2072 states in pertinent part:

> "The Supreme Court shall have the power to prescribe by general rules, the forms of process . . . and the practice and procedure of the district courts and courts of appeals of the United States in civil actions. . . .
>
> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." *See* Colgrove v. Battin. 413 U.S. 149, 161 (1973); Class Action Symposium, 68 Nw. U.L.Rev. 991, 1049 (1974).

are some questions that would need be proved only once such as the distribution of the schedule, but there are other matters which would have to be gone into as many times as there were sales by that defendant during that 4-year period. One jury could obviously not try the facts as to all defendants. There is a serious question whether such ordinary trials could properly be referred to a master. And then, after the case on liability is submitted or tried, the same procedure would have to be followed as to damages.[9] It would appear that generalized treatment would soon fall into individualized law suits. At that point the actions become unmanageable as a class action.

For the foregoing reasons we conclude that the present action is unsuitable for class action treatment. We note that in making this determination we intimate no judgment on the merits.

The judgment of the trial court that the action may be tried as a class action is reversed.

DUNIWAY, Circuit Judge, concurring:

I concur in the judgment, but for somewhat different reasons.

First, I think that this case is controlled by the rationale of our decision in *In re Hotel Telephone Charges,* 9 Cir., 1974, 500 F.2d 86. That case, like this one, was an antitrust case, involving large classes of potential plaintiffs and defendants. We there held that the case was not a proper one for class action treatment for two reasons: (1) that common questions

[9]Again, generalized proof is suggested, as presumably a witness would testify as to what was a fair commission absent the schedule. But the defendant as to each transaction would be entitled to give his particularized version. The suggested commission schedule by its terms applies to "normal" sales.

did not predominate over individual questions (see Rule 23(b)(3), F. R. Civ. P.)), 500 F.2d at 88-90; and (2) that the proposed class action was not a superior method of adjudication (see Rule 23(b) (3)), 500 F.2d at 90-92. The facts here are not identical to those in *Hotel Telephone Charges*, but the differences are minor, and, in my opinion, not significant enough to make the rationale of that case inapplicable to this one.

Second, I cannot believe that Rule 23, as amended, was intended or should be construed to authorize the kind of judicial juggernaut that plaintiffs and their counsel seek to create here. The plaintiffs Kline have been designated as the representatives of an estimated 400,000 sellers of real property in Los Angeles County, sellers of residential dwellings containing up to twelve units. The Klines sold one residence, in 1970, for $42,500. They paid a commission to one broker, Lelah Pierson, of 6%, or $2,550. She is a named defendant. Their theory of damages is that, but for the charged conspiracy, the commission would have been less, but they do not tell us how much less. If we assume that the broker would have done her work for nothing, an obviously improper assumption, their maximum damages would be $2,550, which, trebled, would be $7,650. Realistically, this is a grossly exaggerated figure. Yet the plaintiffs seek to parlay their claim into a lawsuit on behalf of 400,000 sellers, not one of whom, so far as we are advised, except the Sherman plaintiffs, has indicated the slightest interest in suing anyone. The Shermans, too, made but one sale. They paid a 6% commission of $2,700, which was divided between two brokers, neither of whom is named as a defendant. The plaintiffs, by this device, seek to recover from Ms. Pier-

son, among 2,000 others, $750,000,000 in damages, plus attorneys' fees and costs.

The named defendants are 32 real estate brokers and five associations of real estate brokers. They have been designated as representatives of a class of 2,000 brokers. Only one of the "representative" defendants, Ms. Pierson, ever dealt with the "representative" plaintiffs Kline.

At oral argument, plaintiffs explained how easy it will be for them to identify the members of the respective classes. First, they propose, under the aegis of the court, to compel the defendant associations to furnish them with lists showing the name and address of every broker who was a member of any of them at any time during the four year period preceding the filing of this action. These brokers, estimated at 2,000, will be the class of represented defendants. Next, plaintiffs propose under the aegis of the court, to compel each of these 2,000 brokers to search his files and supply the name and address of every person who, during the same period, paid the broker a commission on a sale of residential property containing twelve units or less. These persons, estimated at 400,000, will be the class of represented plaintiffs. Plaintiffs do not tell us at whose expense all this is to be done.

Next, notice will be sent to each of the 400,000 represented plaintiffs. I would expect that the Rule 23 notice to each "represented" plaintiff, as prepared by plaintiffs' counsel, would give him a brief description of the nature of the case, and then would tell him (Rule 23(c)(2)(A)) that he can "opt out," but would also tell him that, if he does not opt out, he will incur no financial obligation, while, if the suit is won, he will

share in the loot. I wonder if this is proper. Why shouldn't a "represented" plaintiff be told that if he elects to participate in the alleged bonanza, he may, by so electing, subject himself to liability for his share of the costs of suit if the bonanza is not forthcoming? Why should the court offer him a free ride in a case in which the defendants' costs, if they win, may be very large, and will probably not be collectible from the named plaintiffs? Why shouldn't what I have said also apply to plaintiffs' attorneys' fees, unless there is an ironclad agreement by the attorneys that they will collect no fees from anyone if the suit is lost? Rule 23(c)(2)(B) states that the notice shall advise each member of the class that "the judgment, whether favorable or not, will include all members who do not request exclusion." In most cases, one of the incidents of an adverse judgment is liability for costs. No doubt it will be said that the potential liability for costs might cause many represented plaintiffs to opt out. If so, what is so wrong about that? It may also be said that the potential liability is meaningless. How would defendants collect? However, there may be a possible alternative. The real bonanza in a case like this, if it is won, will go to counsel. Perhaps the class action order could be conditioned upon an agreement by counsel that they will pay all costs of all defendants if the suit is lost!

Notice will also go to each of the 2,000 represented defendants. Here I note a peculiarity of Rule 23 that none of the parties has mentioned. Rule 23(c)(2)(A) requires that the notice to each member of the class must advise him that "the court will exclude him from the class if he so requests by a specified date." I have read and re-read the rule and I can find nothing in it to indicate that this provision is not just as applicable

to members of a "class" of defendants as it is to members of a "class" of plaintiffs. The notice, therefore, must tell the represented defendant that he can opt out. What member of a class of defendants who is in his right mind, and who is told that, if he does not elect to be excluded, he may be liable for $750,000,000 plus very large attorneys' fees and costs, will fail to opt out? It seems more than probable that the court, having gone to the trouble and expense of learning the name and address of each potential broker defendant and of devising a proper notice and having it sent out, will wind up with no "class" of defendants, but only those who are named as defendants and are served with process in the ordinary way. Yet this will not simplify the action if the 400,000 "plaintiffs" are brought in as a class. It will still be necessary for each such "plaintiff," if he is to share in the loot, to prove (a) that the broker with whom he dealt, whether the broker has opted out or not, participated in the conspiracy, and (b) that he was damaged by the conspiracy, and what his damages are. Opting out is not the same as defaulting—it confesses nothing. And it must be remembered that plaintiffs have demanded a jury trial.

I venture to suggest that none of the class action features of this case was dreamed up by the named plaintiffs, but that all of them are the brain children of their attorneys. In California, barratry is a crime (Cal. Pen. C. §158). The Rules of Professional Conduct of the State Bar, authorized by Cal. Bus. and Prof. Code §6076, provide (Rule 2 §a): "a member of the State Bar shall not solicit professional employment by advertisement or otherwise." Does solicitation cease to be solicitation when done under the aegis of a judge? If so, what has become of the centuries old

policy of the law against stirring up litigation? Did the Supreme Court, when it adopted Rule 23, as amended, intend to abrogate that policy for a case like this? I am loath to believe that it did. I also have grave doubt whether such a change in the law, if intended, can properly be called a matter of procedure. In other words, I doubt that the Supreme Court has power, by a procedural rule, to abrogate the policy to which I have referred, assuming that that is what the Court intended.

Perhaps more important is the practical effect of such a suit as this. The burden that it can impose on the court—discovery, pre-trial, notice to the classes, etc., and on a jury, if one is ever empanelled, is staggering. It is inconceivable to me that such a case can ever be tried, unless the court is willing to deprive each defendant of his undoubted right to have his claimed liability proved, not by presumptions or assumptions, but by facts, with the burden of proof upon the plaintiff or plaintiffs, and to offer evidence in his defense. The same applies, if he is found liable, to proof of the damage of each "plaintiff." I doubt that plaintiffs' counsel expect the immense and unmanageable case that they seek to create to be tried. What they seek to create will become (whether they intend this result or not) an overwhelmingly costly and potent engine for the compulsion of settlements, whether just or unjust. Most, though by no means all, real estate brokers are small businessmen. They cannot afford even to participate in such an action as this, much less to defend it effectively. I suspect, for example, that this is true of Ms. Pierson. It is almost inevitable, if the judge's order is permitted to stand, and even if all potential defendants opt out, that many of the

named defendants will settle for whatever amount they can bargain for, and without regard as to whether they are really liable or not, with a good chunk of the money going to plaintiffs' lawyers.

I do not say that the Rule 23(b)(3) class action is always unethical and improperly coercive. Doubtless there are circumstances in which it is the only viable means of obtaining relief for classes of truly and actively aggrieved plaintiffs. But courts should not be in the business of encouraging the creation of lawsuits like this one.

I join in the judgment of reversal.

APPENDIX "B".

Order Re Class Action Certification.

United States District Court, Central District of California.

Richard Kline, et al., Plaintiffs, vs. Coldwell, Banker & Company, Realtors, et al., Defendants. Civil No. 70-2127-WPG.

Filed: May 7, 1973.

Plaintiffs' Motion for Certification of Classes came on regularly for hearing in the above entitled Court on February 5, 1973, and April 23, 1973, before the Honorable William P. Gray, United States District Judge, upon all of the pleadings and papers then on file in the above entitled action.

The Court having considered the Motion and the supporting documents of plaintiffs, and the opposition of defendants, and their supporting documents, and all of the pleadings and papers on file in this matter, and the matter having been argued and submitted, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiffs' Motion for Certification of Classes is hereby granted in part, denied in part, and modified in part, as expressly provided hereinbelow.

2. Plaintiffs Richard and Margo Kline are hereby certified as representatives of a class of all sellers of residential real property within Los Angeles County, California, who consummated sales of said real proper-

ty during the period September 24, 1966, to September 23, 1970, and in connection with said sales of residential real property, obtained, purchased, or used the services of one or more of the named defendant real estate brokers or brokerage firms, or any member broker of the Los Angeles Realty Board, the Los Angeles Realty Board, Southwest Branch, the Los Angeles Realty Board, Pacific Palisades Division, the Los Angeles Realty Board, Hollywood-Wilshire Division, or the Los Angeles Realty Board, Westwood Division, and compensated said real estate brokers and brokerage firms for said services.

3. The named individual real estate brokers and real estate brokerage firms and the Los Angeles Realty Board, and the Los Angeles Realty Board, Southwest Branch, and the named Divisions of the Los Angeles Realty Board, are hereby certified as representatives of a defendants' class of all real estate brokers who, during any portion of the period September 24, 1966, to September 23, 1970, were members of the Los Angeles Realty Board, the Los Angeles Realty Board, Southwest Branch, or any of the named Divisions of the Los Angeles Realty Board, and who acted, in whole or in part, as real estate brokers in connection with the sale of residential real property.

4. Plaintiff Martin Simon is hereby denied certification as a class representative on behalf of all persons who desired to sell real property within Los Angeles County, California, during the period September 24, 1966, to September 23, 1970, but were unable to do

so for the reasons enumerated at page 3, lines 11 to 27, of plaintiffs' Amended Complaint. Said class of "unsuccessful sellers of real property" is hereby ruled to be inappropriate for Rule 23 certification.

5. "Residential real property," as used herein, shall mean any lot or parcel of real property improved with from one (1) through twelve (12) dwelling units.

6. All motions for summary judgment now on calendar shall be continued to July 16, 1973.

7. The certification of the plaintiffs' class and defendants' class in this action is based, in part, upon this Court's determination that the central issue herein concerns whether there was a conspiracy, entered into by the defendants, to fix prices for commissions in sales of residential real property in Los Angeles County. This central issue presents common questions of law and fact which predominate over any questions affecting only individual members of the classes. A sub-issue in this litigation is whether there was a schedule of commissions prepared, published, and distributed by the defendants herein, and whether said schedule of commissions was substantially adhered to by the broker defendants.

8. The central and sub-issue referred to in paragraph No. 7 above should not have to be tried on more than one occasion. Although individual issues do exist in this litigation, to wit: did the individual broker defendants know of the schedule of commissions and did the individual broker defendants conform to said sched-

ule of commissions?, these individual issues do not predominate over the common questions of law and fact.

9. This Order involves a controlling question of law to which there is substantial ground for difference of opinion, and an immediate appeal from this Order may materially advance the ultimate determination of this litigation. This Court hopes that if the Ninth Circuit Court of Appeals does accept certification of this Order pursuant to 28 U.S.C. §1292(b), that the briefing, hearing and decision on the questions presented herein will be expedited.

DATED: 5/7/73.

/s/ William P. Gray
United States District Judge

APPENDIX "C".

Stephen H. Marks v. San Francisco Real Estate Board, et al.

U.S. District Court, Northern District of California. No. C-71-369 ACW. Filed February 24, 1975.

[CCH headnotes omitted]

Order Granting Defendants' Motion to Decertify Class

WOLLENBERG, D. J.: This is an antitrust class action charging Defendants with conspiring to fix the rate of commission charged by real estate brokers for the sale of residential property in the county of Marin. The action was conditionally certified as a class action by order of the Court filed April 10, 1972 [1972 Trade Cases ¶74.130]. On June 22, 1972, the Court issued an order which revised and narrowed the class to encompass all persons who had paid a brokerage commission on the sale or lease of residential property in Marin County from February 23, 1967, to February 21, 1971 [1972 Trade Cases ¶74.242]. The class was subsequently modified again, and persons who only leased property were excluded.

[*Decertification*]

The case is now before the Court on Defendants' motion to decertify the class. After this motion was briefed and argued and the matter submitted, the Court of Appeals for the Ninth Circuit decided *Kline v. Coldwell, Banker & Co.* [1974-2 Trade Cases ¶75,436], ... F. 2d ..... No. 73-2169 (9th Cir. Dec. 20, 1974). The facts in *Kline* are nearly identical to those in the case at bar, and the Court of Appeals' opinion addresses some of the issues raised by the pending motion.

Because the present case is controlled by *Kline,* and because *Kline* requires that this case not proceed as a class action, it will be unnecessary to discuss other issues raised in Defendants' motion.

Plaintiff herein seeks to assert the claims of approximately 13,000 persons who purchased residential real property in Marin County.[1] The claims and relief pursued by Plaintiff makes an action under Rule 23(b)(3) of the Federal Rules of Civil Procedure, commonly called the "hybrid" class action, the most appropriate class action for this case. To maintain such an action, Plaintiff must satisfy the requirements of Rules 23(a) and 23(b)(3). These requirements are set out in the margin,[2] and only those portions which are pertinent to the disposition of this motion will be discussed.

[*"Fairness"*]

In a class action under Rule 23(b)(3), the Court must find "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The Rule sets out certain factors pertinent to such a finding, but the Court's consideration

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[1]While the class list submitted by Plaintiff contains approximately 13,000 entries, some names appear in more than one entry, so the purported class is actually smaller than 13,000 persons.

[2]Rule 23(a) provides as follows:

Prerequisite to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(3) provides as follows:

Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied,

is not restricted to these factors. "Manageability" is among these factors, and the Court of Appeals for this Circuit has recently expressed great concern for the problems being imposed on litigants and on the federal judiciary by "massive" class actions. *La Mar v. H & B Novelty & Loan Company*, 489 F. 2d 461, 468 (9th Cir. 1973); cf. *Eisen v. Carlisle & Jacquelin* [1974-1 Trade Cases ¶75,082], 417 U.S. 156 (1974). In *Kline* the Court of Appeals introduced the notion of fairness to the defendants as another factor to consider under Rule 23(b)(3): the class action is not "superior to other available methods for the fair and efficient adjudication of the controversy", Rule 23(b)(3), if, because the action is maintained as a class action rather than on an individual basis, each defendant becomes exposed to such massive liability as "would shock the conscience." *Kline v. Coldwell, Banker & Co., supra,* Slip op. at 12-13.

[*Defendant Class*]

Kline might be distinguished from the case at bar on the ground that this issue of fairness was raised in *Kline* during a discussion of whether a defendants' class action was properly maintainable, whereas the case at bar seeks to establish only a plaintiffs' class. The con-

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and in addition: (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

cerns which led the Court of Appeals, in the case of a proposed defendants' class, to

> find that the same reasoning [that class actions are inappropriate] applies to treble-damage actions under the Sherman and Clayton Acts[,]

apply equally in the case of a plaintiffs' class.

In *Kline* there was a plaintiffs' class as well as a defendants' class. What increased the potential liability of the defendant class in *Kline* was not merely the fact of a defendant class. Liability in *Kline*, as in the case at bar, was based on alleged overcharges in commissions paid by sellers of real property. Individuals—particularly when, as in the present case, only residential property is involved—engage in relatively few real estate transactions in a lifetime. Unless there was a plaintiffs' class in *Kline*, the case could not have encompassed the 400,000 to 800,000 real estate transactions which the Court of Appeals found created the unconscionable prospects of staggering liability on the part of each defendant. Regardless of the number of defendants, their potential liability is a function of the number of plaintiffs and the sum of their individual claims.

This point is well illustrated by *Alsup v. Montgomery Ward & Company*, 57 F.R.D. 89 (N.D. Cal. 1972). There was but a single defendant in these two consolidated cases, but because the plaintiff in one of the actions sought to represent a class of approximately 200,000, and in the other a class estimated at five to eight million, the single defendant's potential liability could have been $8.2 billion had the actions been permitted to proceed as class actions. 57 F.R.D. at 89, 92.

Since the problem of the enormity of the potential liability for each defendant is more acute in the case of a plaintiffs' class than a defendants' and is a function not of the number of parties but of the number of individual liabilities in which each defendant must share, the rule formulated by the Court of Appeals in *Kline* cannot reasonably be restricted to cases in which a defendants' class is alleged.

The same problems of proof of Plaintiffs' damages and of fairness to Defendants who will be exposed to possible liability far in excess of three times the actual damages caused by their own acts, are present in this action as well as in *Kline*. Accordingly, this Court must adopt the position of the Court of Appeals and grant Defendants' motion to decertify the class.

It Is Hereby Ordered that Defendants' motion to decertify the class is Granted, and that this action shall no longer proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

It is Further Ordered that Plaintiff's motion to approve a class notice is Denied.

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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-1196

RICHARD and MARGO KLINE, on Behalf of Themselves and All Others Similarly Situated,

Petitioners,

vs.

COLDWELL, BANKER & CO., REALTORS, Etc., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinion Below.

The opinion of the Court of Appeals for the Ninth Circuit is reported at 508 F. 2d 226.

Question Presented.

Should the Court review this case where the Court of Appeals ruled that, measured against proper legal standards, the action was not suited for class litigation because: (a) individual questions predominated over common questions, (b) the suit was not superior to the other available alternatives for the fair and efficient adjudication of the controversies, and (c) was not manageable?

Statement of the Case.

A. The Pertinent Pleadings.

The amended complaint [R. 1][1] alleges antitrust claims by plaintiffs Richard and Margo Kline, husband and wife, on behalf of themselves and all sellers of real estate in Los Angeles County who within the previous four years used the services of any of the 32 named defendant real estate brokers or any of the defendant class members, brokers who belong to the defendant Los Angeles Realty Board.[2]

The complaint charges a conspiratorial restraint of trade violative of §1 of the Sherman Act (15 U.S.C. §1). It alleges that "the defendants and each of them have knowingly and unlawfully combined, conspired and agreed" to raise and fix the commissions they would charge as real estate brokers, to prevent and suppress competition, to publish and circulate and adhere to schedules of commissions, to refuse to accept multiple listings at other than fixed commission rates, and to adhere to exclusive listings to discourage real estate sales which bypassed the defendants [Amended Complaint, ¶¶27, 28, R. 12].

By their answers the defendants generally denied the charges, the defendant Board admitting that it published and distributed a commission schedule but deny-

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[1]"R" refers to the record on appeal in the Court of Appeals. "Pet." refers to the petition for writ of certiorari. "App." refers to the appendix to the petition. Emphasis within quotations is supplied unless otherwise noted.

[2]The representative party defendants are the Los Angeles Realty Board (hereinafter "Board"), its divisions and branch and 32 named broker defendants.

ing that any member was compelled or required to follow it. The Board's schedule states:

> "It should be understood that no member of the Los Angeles Realty Board, or any other Realtor is in any way bound by this Schedule. The amount of the commission on any real estate transaction is a matter for the parties to that transaction and is in no way subject to the control of the Los Angeles Realty Board." [R. 59]

Every one of the defendants denied participation in any conspiracy [R. 46, 65].

B. The Discovery.

In the two-year period prior to the class action order, the parties engaged in extensive discovery addressed to the merits and the class issues, pertinent parts of which were before the courts below. In particular, plaintiffs were afforded full opportunity by the district court to pursue class action related discovery by interrogatories, by deposition and by document production requests [R. 119-121]. Plaintiffs propounded extensive interrogatories and document production requests both to the Board [R. 152, 166], and to each of the 32 broker defendants [R. 171, 182].

The discovery disclosed the following: The claim of the representative plaintiffs, the Klines, concerns but one transaction, and they used the services of only one broker defendant, Lelah T. Pierson Co. [R. 423-24, 426-28]. The Klines seek to represent all sellers of Los Angeles County residential property over the four-year period prior to the suit, involving an estimated 400,000

transactions[3] in which assertedly more than 2,000 brokers performed services.[4]

The individual character of the questions affecting the liability of each broker was shown by the discovery responses of the defendant brokers. Virtually every broker answering responded negatively to inquiries whether the Board's schedule of commissions was used or followed. Each gave highly individual responses to queries exploring the methods by which commissions were determined.[5] Some emphasized their analyses of their operating costs as a major factor influencing their commission;[6] some focused on the condition of the local market in which they operated;[7] still others denied that they had any commission "policy" but emphasized their relationship with each person listing property with them and the circumstances peculiar to each transaction including the negotiations necessary to close the deal.[8]

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[3]During the four-year period here involved approximately 800,000 deeds were recorded in Los Angeles County [R. 1050, 1070-71]. Based on this fact, defendants estimated that 400,000 sales could be involved in this class suit [R. 1050]. This estimate was not disputed below, and plaintiffs suggested to the Court of Appeals that the plaintiff class might be even larger. *Kline v. Coldwell, Banker & Co.*, 508 F. 2d 226, 228 n.1 (9th Cir. 1974).

[4]The Board is a California corporation which, during the relevant period, had a membership of approximately 2,000 licensed brokers [R. 58, 463].

[5]R. 562, 574, 592, 607, 626, 641, 652, 663, 677, 687, 696, 706, 716, 726, 736, 747, 761, 772, 788, 797, 805, 821, 838, 853, 863, 877, 890, 945, 957, 1121.

[6]R. 641, 736, 747, 821, 863, 957.

[7]R. 626, 736, 788, 797, 945.

[8][R. 574, 652, 663, 677, 772, 821, 890]. Illustrative of the highly individual nature of each claim sought to be class litigated is the statement by broker defendant John Langdon:

"I received a copy of the Board's Desk Diary each year. I am aware that this Desk Diary contained a list of com-

Pierson, the broker with whom the Klines dealt, denied using or following the Board's schedule [R. 877], stating that in determining commissions the company takes:

> ". . . into consideration the increase in costs such as advertising, telephone, general office and business expenses; as well as considering what other real estate brokers in the area were charging." [R. 878].

The discovery also reflected the arms-length negotiation of commissions involved in claims sought to be class-tried. Plaintiff Simon,[9] who ultimately listed his property with defendant Helen Meigs, rejected the initial listing agreement tendered by Mrs. Meigs for a percentage commission. Thereafter, for nearly two months Mr. Simon, aided by his lawyer, and Helen

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missions or fees, however, this list meant nothing to me. I have always determined my rate of commission independently and I had determined in April 1966, that in order to get the return I felt was proper, I would have to ask a 6% rate of commission. Since April 1966, the large majority of my listings have been at 6%. In any event I have never communicated with the Board or with its divisions, branch or officers or directors regarding commissions or fees. I have never discussed the Board's list of commissions or fees with other members of the Board. I was never asked or told or pressured by any other broker to charge a specified fee or follow any schedule or list of fees for any real property transaction in which I was involved, nor have I ever asked or told or pressured any broker outside my Company to charge a specified fee or follow any schedule or list of fees. I have had nothing to do with the Board's list of commissions or fees; my Company and I did not aid in the drafting of this list; did not agree that it be published or distributed; did not request that it be prepared or sent to me or to any other person; did not agree to use it; was never asked or told to use it; never asked or told anyone else to use it; and never did use it." [R. 1141-42].

[9]Plaintiffs Martin Simon and Martin and Florence Sherman were not certified as representatives of the plaintiff class. They did not appeal that ruling and have not joined in the petition.

Meigs negotiated virtually every element of the listing, including the commission.[10]

C. The Class Action Proceeding.

Following discovery, extensive briefing and two hearings, the trial court granted petitioners' motion that the suit be maintained as a class action under Rule 23(b)(3) [R. 82, 1328]. Defendants urged that issue required pragmatic evaluation of courtroom realities in relation to an attempted trial of the multifaceted separate questions presented by plaintiffs' proposed theory of the case; that such an evaluation showed that the claims *and* defenses presented serious and substantial questions for resolution at trial which were *not* common, but to the contrary, were individual to each claimant and each defendant class member; and that the trial of those individual questions would overwhelm and predominate over the trial of the few that were common with the result that the suit would be unmanageable and not superior for the fair and efficient adjudication of the controversies.

In response, petitioners asserted a theory which, they said, would short-circuit the myriad litigations this suit presented.[11] They urged (as they also did in the Court of Appeals) that the adjudication of these treble damage antitrust claims did *not* require claimant-by-claimant v. broker-by-broker litigation, claiming each broker's liability would be *established* on a showing: (i) of his knowledge of the Board's schedule and (ii) that he charged commissions in conformity with the schedule in

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[10]Deposition of Martin Simon, Vol. II, 142-233, Exhibits K, N, R.

[11]Petitioners never asserted below that their discovery had not been ample to present their position on the class action issue.

the "vast majority of transactions" [R. 1172-73].[12] Alternatively, they urged that each broker's liability would also be *established*—and individual litigation averted—by mere proof of his continued membership in the Board after learning of the schedule (on their assumption that the schedule was *per se* illegal).[13]

Thus, the questions posited by the petitioners, in both the district court and the Court of Appeals, were: (1) whether these theories of generalized proof designed to avoid individual litigations, provided a means whereby the *full* trial of the case and all its myriad claims could be adjudicated; (2) whether thereby individual questions, otherwise predominant, would be eliminated; and (3) whether such a litigation was fair, efficient and manageable within the meaning of Rule 23(b)(3).

D. The District Court Order.

The district court, accepting the petitioners' concepts, certified both the plaintiff and defendant classes. It identified the common issue as: "Was there a conspiracy to fix the prices and was it [in gross] adhered to?" and stated "that issue should not have to be tried over and over again against individual defendants." The individual question was identified as "[D]id the particular defendant adhere to this schedule? I suppose you could break that down to: Did he know of the schedule, and did he *conform generally* to it? Now, his books and records will show whether he conformed. . . . [I]f he knew of the schedule, and *generally adhered* to it, then, it seems to me that he is participating in his con-

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[12]This is the so-called "Adherence" theory (508 F. 2d at 231, 233).

[13]This is the so-called "Membership Ratification" theory (508 F. 2d at 231).

duct in furtherance of this conspiracy." [Reptr's Tr., April 23, 1973, at 5-7].

Acknowledging the pivotal nature of petitioners' legal theory which it had adopted, the district court certified its ruling for interlocutory appeal, stating:

> ". . . I would hate to get a long way down this road that we are looking down and send out all these notices at considerable expense, and have a general hearing, and go through all the laborious effort of individual issues, and have the appellate court conclude *that the proof on the individual issue that the court accepted along the lines that I've talked about here* is not sufficient. It seems to me that it would be well to certify this matter and be guided accordingly." [*Id.* at 7-8].

E. The Court of Appeals' Decision.

In sum, the Court of Appeals in reversing the order ruled it was clear under "substantive antitrust law" that in order for any of the 2,000 broker class members to be liable in this treble damage case "he must have 'knowingly, intentionally and actively participated in an individual capacity in the scheme' " (508 F. 2d at 232); that even petitioners' own proposal for proof of each claim on the adherence concept would involve separate proof as to the liability of each defendant class member with whom each seller dealt; that such evidence would at best only make out a *prima facie* case and each defendant "would then have the right to come forward and submit his proof" (508 F. 2d at 233, 235-36); that "Each defendant is clearly entitled

to come forward and prove that he did not know of the commission schedule or that he opposed it or ignored it or perhaps, some other yet unknown defense." (508 F. 2d at 233); that proof of each claimant's injury must also be adjudicated (508 F. 2d at 233, 236 nn. 8, 9); that such proof, and each defendant's response thereto at trial, would cause the trial to "fall into individualized law suits." (508 F. 2d at 236); that the common questions did not predominate over those affecting individual members (508 F. 2d at 233); that the proposed massive class suit, pitting 400,000 or more sellers seeking 750 million dollars against 2,000 brokers was not fair, efficient or superior to available alternatives given the tremendous problems posed by trial coupled with the "staggering" exposures thus generated (508 F. 2d at 234-35).

For these reasons, the Court of Appeals concluded that plaintiffs had not demonstrated "that the questions of law or fact common to the members of the class predominate over the questions affecting individual members"; or that "this class action is superior to other available methods for the fair and efficient adjudication of the controversy"; or that the suit is manageable (508 F. 2d at 233, 235-36).

REASONS FOR DENYING THE WRIT.

Plaintiffs advanced a plan or blueprint for the trial of their proposed class suit. The district court accepted plaintiffs' approach, but requested the Court of Appeals to examine the legal principles upon which it was founded. That Court, responding to the certification, held that the district court's order and petitioners' proposed approach were opposed to settled principles of substantive law and contrary to the standards of Rule 23(b)(3). The Court, therefore, ruled that this action is not suitable for class action treatment.

The decision is based on long-settled principles of antitrust law. It properly applies the specific requisites of Rule 23 delineating appropriate class actions. It does not conflict with the decisions of this Court discussing Rule 23 and is within the Court of Appeals' jurisdiction under 28 U.S.C. §1292(b) on review of interlocutory orders as certified by the district court.

This case, therefore, does not present any "special or important reasons"[14] for review by this Court, and the petition should be denied.

I

The Court of Appeals' Decision Did Not Outlaw Antitrust Class Actions and Does Not Conflict With This Court's Decisions Respecting Rule 23.

Petitioners misstate both the nature and effect of the decision below in an attempt to set up a conflict with the decisions of this Court dealing with class actions in antitrust cases, *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *American Pipe and Construc-*

[14]Rule 19(1.), Rules of the Supreme Court of the United States.

tion Company v. Utah, 414 U.S. 538 (1974) and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). Petitioners' argument proceeds on the assertion that "the clear import of the Court of Appeals' decision is that class actions seeking treble damages for alleged antitrust violations under the Sherman and Clayton Acts are precluded" [Pet. at 10]. Upon this faulty premise, petitioners state the *Kline* decision will "put an end to one of the most effective tools for private enforcemen of the antitrust laws" and is contrary to these decisions of this Court [Pet. at 12].

The Court of Appeals, of course, did not announce, either explicitly or by reasonable inference, a blanket rejection of treble damage antitrust class actions. Petitioners base their patently erroneous postulate on a single passage from the Court's discussion of the impact of the Rule 23(b)(3) superiority standards.[15] Clearly the Court was addressing, in narrow focus, only the extreme unfairness sought to be visited on the 2,000 defendant class members through the device of this class action. It stated the intent of Congress was to punish the violator "for his own malefactions, not

[15]That passage was, "We find that the same reasoning applies to treble-damage actions under the Sherman and Clayton Acts" (508 F. 2d at 235). The Court was addressing only the fairness aspect of the superiority requisite and analogized the situation here to that presented in decisions under the Truth in Lending Act which held class treatment not appropriate where "outrageous amounts [were sought] in statutory penalty cases" (508 F. 2d at 234), referring to *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972); *Shields v. First National Bank of Arizona*, 56 F.R.D. 442 (D. Ariz. 1972) and *Alsup v. Montgomery Ward & Co.*, 57 F.R.D. 89 (N.D. Cal. 1972).

to subject him to vicarious liability by the coincidence of a class action for the staggering damages of the multitude" (508 F. 2d at 235).[16] The statement petitioners refer to was made in that closely circumscribed context, and so viewed is correct.

Furthermore, a fair reading of the entire segment of the decision dealing with the superiority-fairness aspects makes it clear that the ruling on this facet of Rule 23 was additionally grounded in other elements pertinent to the superiority inquiry. These included: (1) the absence of any showing that " 'economic reality' might dictate that this action proceed as a class action or not at all" (508 F. 2d at 233); (2) the lessened need for the proposed class action in light of petitioners' damages prayer which showed that individual damages in many instances "would be substantial" 508 F. 2d at 234;[17] and, (3) the patent unmanageability of multitudes of individual jury trials which would flow inevitably *in this case* from the mandates of substantive antitrust law overlaid upon plaintiffs' theory of trial.[18]

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[16]In that connection, the Court postulated a $1,000 overcharge potentially subjecting a broker to $750 million liability because "he joined a realty board and received and followed suggestions as to proper commissions" (508 F. 2d at 235).

[17]In that context the Court stated that the potential benefits of the proposed class did not rise to the same dimensions as in *Eisen* where the individual award sought was only $70, or in *In Re Hotel Telephone Charges*, 500 F. 2d 86 (9th Cir. 1974), where the individual claim was only $2 (508 F. 2d at 234).

[18]The Court explicitly linked its conclusion regarding superiority to "the problems engendered by the requirement of proof of damages" (508 F. 2d at 235), pointing out that Rule 23: ". . . does not eliminate the ultimate need for individual proof of damages by each member of the class. Nor does it foreclose the right of each defendant to assert his defenses before a jury if one is requested." (508 F. 2d at 236, n. 8), and that: ". . . the defendant as to each [real estate sale] transaction would be entitled to give his particularized version." (*Id.*, n. 9). These considerations were: ". . . matters which would have to be gone into as

Moreover, it is of course evident that the decision below rests as well on additional grounds sufficient in themselves, such as the absence of predominating common questions and the unmanageability of the suit.

The Court of Appeals in no way disregarded the class action comments of this Court in *Hawaii*, *American Pipe* or *Eisen*. Indeed the decision below was addressed to and applied the "specific rules for delineating the appropriate plaintiff-class", referred to in *Hawaii* (405 U.S. at 266). *American Pipe* dealt only with the propriety of intervention following class denial. Indirectly it indicated general approval of class actions, but the decision below in the context of the case presented is not contrary.

In *Eisen*, as petitioners recognize [Pet. at 13], "the appropriateness of class actions in the context of treble damage actions was not questioned", and it was thus not an issue passed upon. However, this Court did hold that Rule 23 may not be used to undermine "the traditional rules and procedures applicable to civil trials." (*Eisen*, 417 U.S. at 40 L. Ed. 2d at 749). In the present case the Court of Appeals applied this precept of *Eisen* in rejecting petitioners' position that the proof requisite to establish each claim could be short-circuited through generalized means and that each class defendant was, somehow, not entitled to a full defense against the charges (508 F. 2d at 236 and nn. 8, 9).

Thus the Court did not approach the matter of the fairness of the massive class suit in isolation as petitioners portray. It considered and applied all requisites prescribed by Rule 23(b)(3). Only in the context, of

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many times as there were sales by that defendant during that 4-year period." (*Id.*)

the factors present in this case but not necessarily in other cases, did the Court say that, "*in this situation*" the proposed treble damage class led "to an ad absurdum result" and thus contravened the fairness requirement of Rule 23(b)(3) (508 F. 2d at 235). The decision below was entirely appropriate in the context of the special facts presented by this extreme class suit.

II

The Court of Appeals' Decision Does Not Conflict With Any Decision of This Court Regarding Proof of Participation in an Antitrust Conspiracy.

The Court of Appeals held that "substantive antitrust law" requires the trier of fact to find that an alleged conspirator "knowingly, intentionally and actively participated in an individual capacity" in the alleged conspiracy before liability can be fastened upon him (508 F. 2d at 230, 232, 233). The Court also ruled that Rule 23 cannot deprive the alleged participant of his right "to come forward and submit his proof" (508 F. 2d at 236).

Contrary to petitioners' contentions [Pet. at 26-30], the Court below correctly applied the decisions of this Court governing proof of conspiracy in antitrust cases,[19]

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[19] *Theatre Enterprises, Inc. v. Paramount Distrib. Corp.*, 346 U.S. 537 (1954); *Interstate Circuit v. United States*, 306 U.S. 208 (1939); *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950). The basic test was set forth by this Court in *Theatre Enterprises:*

> "The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. [Citations omitted.] *But this Court has never held that proof of parallel business behavior conclusively establishes agreement* or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Cir-

including *National Association of Real Estate Boards* and *Interstate Circuit*, which petitioners claim was misapplied.

The Court did not, as petitioners suggest, hold that participation in a conspiracy may not be shown by adherence to the fee schedule; indeed, at several junctures it assumed such proof could establish a *prima facie* case (508 F. 2d at 233, 236).[20] What the Court below did rule in this respect was that, where the critical element of agreement has not been conceded as it was in *National Association of Real Estate Boards*, the issue of each broker's alleged adherence is a fully litigable issue. Each person charged is entitled to a trial on the crucial issue whether he "knowingly, intentionally and actively participated in an individual capacity in the scheme" (508 F. 2d at 232). Correctly, it ruled that that question cannot be *resolved* at trial by *generalized* evidence (*e.g.*, in the words of the district court, by proof that a broker "conformed generally" to the schedule).[21]

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cumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; [Footnote omitted] but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." (346 U.S. at 540-41). See also: *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F. 2d 656, 665 (9th Cir. 1963), *cert. denied* 375 U.S. 922 (1963), *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F. 2d 199 (3d Cir. 1961), *cert. denied* 369 U.S. 839 (1962).

[20]The significance to class certification of the difference between a *prima facie* case and a complete trial apparently escapes petitioners, but not the Court of Appeals (508 F. 2d at 236), and not this Court. Compare *Interstate Circuit, supra*, with *Theatre Enterprises, Inc., supra.*

[21]*National Association of Real Estate Boards* itself highlights this distinction. There the code, concededly subscribed to by all members, was an open-and-shut agreement, *and was not ques-*

(This footnote is continued on next page)

Furthermore, the ruling below in no way contravened this Court's *Interstate Circuit* decision. There, after a full trial, it was found that each defendant "knew that cooperation was essential to the successful operation of the plan." (306 U.S. at 226). Thus when that case came to this Court, the agreement issue had already been litigated and adjudicated. That element has been neither conceded nor yet litigated here, and whether it can be supplied at trial is an important issue needing litigation with regard to each defendant broker as part of each seller's claim that he sustained injury by reason of conspiratorial conduct.

The Court of Appeals, therefore, did not misapply this Court's prior decisions. It simply reiterated the bedrock principle that each person charged must be shown to be a knowing participant in a conspiracy, and has a right to defend against the charge, before a treble damage judgment may be had against him.

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tioned, either in the district court (84 F. Supp. 802) or in this Court. The only issue was whether the agreement was an illegal restraint of trade. Here all brokers vigorously deny participation in any agreement. Furthermore, in *National Association of Real Estate Boards,* this Court affirmed the defense judgment in favor of the National Association and its officer, the two defendants who *had* contested participation in the agreement.

Petitioners' argue the Court of Appeals misstated the teaching of that case by its conclusion that that decision required, for a *per se* violation, an agreement "and" adherence or consensual approval [Pet. at 27]. This argument has no merit. The Court below was focusing upon the requirement for proof of a member's participation in an agreement, not whether an agreement existed. A member is not responsible for an agreement unless he participates; thus, before that member is liable there must be shown both an agreement *and* that member's adherence to the agreement.

III

The Court of Appeals Did Not Preempt the Trial Court's Discretion.

The trial court made the class order after two years of pretrial, extensive discovery, briefing and two hearings. The ruling was certified for interlocutory appeal once the definitive decision had been made to adopt petitioners' generalized proof concepts as a means of accommodating this otherwise impossible class litigation. Clearly the district court certified its order as a wise precaution for appellate review and guidance on the unusual procedures adopted. See page 8, *supra*.

The decision of the Court of Appeals did not "preempt" or displace the trial court's discretion as petitioners now claim [Pet. at 15-17]. Rather it responded to the lower court's invitation for review and guidance. In essence the Court of Appeals ruled the trial court had misconstrued the "substantive antitrust law" and misapplied the standards of Rule 23(b)(3).

The trial court's discretion was not preempted.

IV

It Is Neither Necessary nor Appropriate in the Present Case for This Court to Articulate Standards for Appellate Review of Class Certifications.

This case presents neither conflict with a decision of this Court nor any novel question appropriate for review. Nor does it present any basis for the articulation of any "standards" to govern appellate review of class certifications, as petitioners request [Pet. at 15, *et seq.*].

Petitioners assert the Court of Appeals found the suit unmanageable because of its size alone [Pet. at

21], but it is evident this was not the predicate of the ruling. Size was only one part of the equation, the others involving the analysis of the issues of fact and law presented for jury trial resolution.

Next, petitioners claim the Court improperly passed upon "evidence" [Pet. at 19]. This is not so. The Court did not rule on the evidence; it merely analyzed plaintiffs' proposed *plan* of trial in light of the issues presented. Moreover, the Court did not rule that adherence to the schedule could not be *prima facie* evidence of a member's participation, but only that such proof would not be conclusive, and that each defendant would still be entitled to introduce his own evidence in defense.

In like vein, petitioners argue an "implied premise" of the decision below necessitates that they "try the merits . . . to permit a class certification" [Pet. at 18, 19]. This is not so. It is plain the Court was aware of and responsive to this Court's ruling in *Eisen* that "a preliminary or 'mini-hearing' on the merits to determine whether . . . [the action] might be maintained as a class action was improper" (508 F. 2d at 230, n. 3).

Nor did the Court make any conclusion "on the ultimate merits of the litigation", as claimed by petitioners [Pet. at 19], by its ruling that the admitted preparation and printing of the price schedule by the Board and its distribution is not enough under "substantive antitrust law" to establish civil or criminal liability as to the Board's members (508 F. 2d at 530-32). Manifestly this was a statement on a question of law, and was correct.

The Court properly responded to the district court's request for review and guidance on the legal questions presented.

Conclusion.

For the reasons stated, the petition for a writ of certiorari should be denied.

Dated: April 16, 1975.

Respectfully submitted,

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